Supreme Court, U.S.
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No. 01-1406

In The

Supreme Court of the United States

PETER TAVOULAREAS,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS and LOCABAIL (UK) LIMITED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT LOCABAIL (UK) LIMITED

ALLAN R. KELLEY
Counsel of Record
Fla. Bar No. 309893
JUNE GALKOSKI HOFFMAN
Fla. Bar No. 050120
FOWLER WHITE BURNETT P.A.
Bank of America Tower, 17th Floor
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTION PRESENTED

Pursuant to Sup. Ct. R. 15.2, Respondent Locabail (UK) Limited ("Respondent" or "Locabail") objects to the question presented by the Petitioner because it is unduly argumentative in violation of Sup. Ct. R. 14.1(a) and seeks consideration of a question not appropriately arising from or otherwise accurately reflecting the proceedings below. If this Court grants the petition based on this question, Respondent submits that the following is a more accurately phrased question:

> WHETHER THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO REVIEW A DISCRETIONARY DISMISSAL OF AN ACTION ON GROUNDS OF *FORUM NON CONVENIENS* BECAUSE IT SO FAR DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND THE CIRCUIT COURT SANCTIONED SUCH A DEPARTURE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent submits the following list of interested persons and a complete list of Respondent's parent corporations and publicly held companies that own 10% or more of Respondent's stock:

Banque Nationale De Paris (Defendant/Appellee/Respondent)

District Court Judge: Kenneth L. Ryskamp

S. Joanne Greer, Esq. (Attorney for Defendant, Locabail (UK) Limited)

June Galkoski Hoffman, Esq. (Attorney for Respondent/Appellee, Locabail (UK) Limited)

Allan R. Kelley, Esq. (Attorney for Defendant/Appellee/Respondent Locabail (UK) Limited)

Nikki B. Lewis, Esq. (Attorney for Defendant/Appellee/Respondent, Banque Nationale De Paris)

John W. Little, III, Esq. (Attorney for Defendant/Appellee/Respondent, Banque Nationale De Paris)

Locabail (UK) Limited (Defendant/Appellee/Respondent)

J.B. Murray, Esq. (Attorney for Defendant/Appellee/Respondent, Banque Nationale De Paris)

Peter Tavoulareas (Plaintiff/Appellant/Petitioner)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT – Continued

Rachelle R. McBride, Esq. (Attorney for Plaintiff/Appellant/Petitioner)

Peter S. Sachs, Esq. (Attorney for Petitioner)

Spencer M. Sax, Esq. (Attorney for Plaintiff/Appellant/Petitioner)

UFB-Locabail

Compagnie Bancaire

Group Paribas, n/k/a Groupe BNP-Paribas

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STATEMENT OF THE CASE

Respondent cannot accept Petitioner's Statement of the Case because it omits or otherwise misstates certain pertinent procedural facts and is argumentative with regard to its statement of material facts. Sup. Ct. R. 15.2 and 24.2. The following additional matters should be considered by the Court in ruling on the instant petition.

A. The Prior Litigation in England Involving Tavoulareas and Locabail and the English Cost Liability Judgment Against Tavoulareas

In 1996, Allied Trust Bank Limited (an English registered bank) commenced a lawsuit in England against Bayfield Properties Ltd. ("Bayfield"), a company that was then controlled by a Mr. Ares Emmanuel. (R-10-24). That action sought to foreclose a loan and seize the collateral that Bayfield owned, namely a property named Hawks Hill in Surrey, England. (R-10-24). The English court entered a possession order in favor of Allied Trust on June 18, 1996. (R-10-24). A few days later, Locabail took an assignment of the Allied Trust Bank judgment and security, *i.e.*, Hawks Hill, and was substituted as plaintiff in the action in place of Allied Trust. (R-10-24). Thereafter, the wife of Mr. Emmanuel, Barbara Emmanuel, who is also the former wife of Petitioner Tavoulareas, intervened in the lawsuit alleging that she had an equitable interest in Hawks Hill. (R-10-24). Mrs. Emmanuel claimed that her equitable interest was superior to that of Locabail, and made an application to the Court to set aside the possession order. (R-10-24). The matter proceeded to trial

over the course of sixteen (16) days in October and November of 1998. (R-10-24). During the course of the proceedings, Tavoulareas admitted in his oral testimony to the Court that he was financing Mrs. Emmanuel's costs of the litigation. (R-10-24). Therefore, Locabail sought leave of the Court to add Tavoulareas as a Defendant in the lawsuit, as is allowed under English law pursuant to section 51 of the Supreme Court Act 1981. (R-10-24).

Ultimately, Locabail prevailed on the merits and was awarded a judgment against Mrs. Emmanuel. (R-10-24). On March 29, 1999, the Court entered an order that Mrs. Emmanuel was obligated to pay Locabail's costs of the proceedings. (R-10-24). The Court also issued orders permitting Locabail to add Tavoulareas as a Defendant and to serve him in Boca Raton pursuant to Florida law, with the summons seeking an order that Tavoulareas pay Locabail's costs pursuant to the power contained in section 51(1) of the Supreme Court Act 1981. (R-10-24). Service on Tavoulareas was accomplished on May 10, 1999. (R-10-24-25). Having obtained valid service of process on Tavoulareas, Locabail sought a judgment against Tavoulareas for costs incurred by Locabail in the defense of Mrs. Emmanuel's claim in the lawsuit. (R-10-25). Tavoulareas had notice and an opportunity to appear in and to defend these proceedings in London, England. (R-10-25). Nevertheless, Tavoulareas elected not to enter an appearance or to challenge or defend the suit against him in London, England. (R-10-25). On December 20, 1999, the Court of Justice, Chancery Division in London, England, entered a cost liability judgment against Tavoulareas directing him to pay Locabail's attorney's fees and costs (the "English Cost Liability Judgment").

(R-10-25). Tavoulareas did not appeal the English Cost Liability Judgment to a higher court in England. (R-68-22, 23). The English Cost Liability Judgment had not been reduced to a sum certain, and a hearing on the amount of the costs to be awarded Locabail had not taken place in London, England before the District Court rendered the Dismissal Order in the instant case. (R-10-25). Locabail had not taken any steps to enforce its judgment against Tavoulareas either in England or in Florida. (R-10-25).

B. Tavoulareas' Premature and Collateral Attack on the Enforceability of the English Cost Liability Judgment in the United States District Court

1. Tavoulareas' Declaratory Judgment Action

As an apparent preemptive strike to any efforts by Locabail to enforce the Cost Liability Judgment in Florida after the ultimate entry of an actual cost judgment with a sum certain in the London litigation, and in an attempt to litigate certain issues in the United States, Tavoulareas brought a declaratory judgment action against Locabail and Banque Nationale de Paris ("BNP") in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Florida. (R-39-3,4). Tavoulareas' action sought a declaratory judgment that the English Cost Liability Judgment was not enforceable in the United States. (R-39-3,4).

With respect to jurisdiction, Tavoulareas falsely alleged that Locabail is authorized to and conducts business in Florida. (R-39-1) (R-10-23). Tavoulareas also inaccurately alleged that Locabail and BNP are "interrelated

parent and subsidiary companies with overlapping officers, directors, employees and business interests such that they constitute one legal entity" and that "all conduct of Locabail relevant to [the declaratory judgment] action was authorized, sanctioned, and orchestrated or directed by BNP". (R-39-1) (R-10-23). The Summons issued for Locabail stated that the Sheriff was commanded to serve the Summons and Complaint on Locabail "by serving its Registered Agent Ramon Hernandez" at a particular address in Miami, Florida. (R-10). The Verified Return of Service reflects that Richard E. Largo delivered the Summons and Complaint to Ramon Hernandez *"as Registered Agent of the within named corporation."* (R-10).

Locabail removed the case to the District Court based on diversity jurisdiction. (R-1).

2. Locabail and BNP's Motions to Dismiss or Alternative Motions for Summary Judgment

On June 22, 2000, Locabail filed a Motion to Dismiss, or in the Alternative, for Summary Judgment with the supporting affidavit of Stuart Fitzpatrick, Esq. (the "Fitzpatrick Affidavit") (R-10). In that motion, Locabail asserted that Tavoulareas' Complaint should be dismissed for lack of subject matter jurisdiction under the Federal Declaratory Judgment Act, for lack of personal jurisdiction and for insufficiency of service of process and insufficiency of process. (R-10). Also on the same day, BNP filed a Motion to Dismiss, Alternative Motion for Summary Judgment, relying as well on the Fitzpatrick Affidavit, and asserted that Tavoulareas' Complaint

should be dismissed among other reasons for (1) lack of subject matter jurisdiction under the Federal Declaratory Judgment Act; and (2) failure to state a claim upon which relief could be granted because BNP was an improper party without any adverse interest, as a judgment creditor or otherwise, with respect to the London litigation or the instant case. (R-9). Locabail and BNP asserted that the District Court did not have jurisdiction over Tavoulareas' claim for declaratory relief because there was no actual case or controversy to be determined by the Court at that time and that nevertheless, the District Court should decline to exercise its discretion to adjudicate that claim. (R-9) (R-10).

Locabail also asserted in its Motion to Dismiss that the District Court had no personal jurisdiction over it because it was a foreign entity registered and doing business in England, was governed by English law, was not registered or otherwise conducting business in the State of Florida and did not have sufficient minimum contacts with the State of Florida to satisfy traditional notions of fair play and substantial justice. (R-10). The Fitzpatrick Affidavit established that Locabail had no contacts with Florida; it did not have an office in Florida; it did not have any directors, officers, agents, or employees in Florida; it was not registered to conduct business in Florida; nor had it appointed an agent to receive service of process in Florida. (R-10-23-25).

The Fitzpatrick Affidavit also explained in detail the relationship between Locabail and BNP, describing the distant and attenuated financial and ownership interest that BNP acquired in Locabail in August of 1999 as a result of the hostile takeover by BNP of Groupe Paribas.

(R-10-23). As set forth in the Fitzpatrick Affidavit, Locabail is a 100% subsidiary of UFB-Locabail, a French leasing company incorporated in France. (R-10-23). UFB-Locabail is 90% owned by Compagnie Bancaire, a French bank registered in France. (R-10-23). In turn, Compagnie Bancaire was 90% owned by Groupe Paribas, a French bank registered in France. (R-10-23). After the merger, the merged companies of Groupe Paribas and BNP combined their names and are now named "Groupe BNP-Paribas". (R-10-23). Groupe BNP-Paribas owns directly 90.6% of UFB-Locabail. (R-10-23). The remaining 9.4% is held by other subsidiaries of Groupe BNP-Paribas. (R-10-23). Locabail remains 100% owned by UFB-Locabail. (R-10-23).

After the hostile takeover, Locabail found itself to be a subsidiary of BNP on paper alone. (R-10-23). All business operations remained separate, both geographically and financially. (R-10-23). As stated succinctly by Mr. Fitzpatrick, "the two companies have no common dealing." (R-10-23). He went on to greater detail, explaining that BNP exerts and exerted no control over Locabail's business dealings and transactions, and that they have no common officers, directors, employees, or even business interests. (R-10-23,24).

In addition, Locabail asserted in its Motion to Dismiss that it was not served with process in accordance with Fed.R.Civ.P. 4 because the person served, Ramon Hernandez, was neither Locabail's registered agent for service of process nor otherwise authorized to receive process on behalf of Locabail at any time. (R-10).

In its Motion to Dismiss, Locabail also argued, as supported by the Fitzpatrick Affidavit, that the Southern District of Florida was an inconvenient forum for any litigation with Tavoulareas and that London, England was the more appropriate venue:

> In the matter before the court, it cannot be controverted that LOCABAIL is at a tremendous disadvantage, and faces considerable inconvenience, burden and expense to defend the declaratory judgment action filed by the Plaintiff since it operates its business in London, England. [Statement ¶2 and ¶3.] As the costs judgment, attached to the Complaint as Exhibit "B" states, TAVOULAREAS used to reside in England, with his wife and children, maintained property in England and conducted business in England. [Exhibit "B" to Complaint, attachment, at ¶4.] Although it is unknown whether he maintains any contacts to England, it is well established that LOCABAIL has no contacts to Florida. This factor should be considered by the Court in its determination of the equities.

(R-10-11).

In opposition to Locabail's Motion to Dismiss, Tavoulareas did not provide the District Court with any competing affidavits, sworn statements or other competent proof to substantiate its jurisdictional allegations with respect to Locabail, or to otherwise refute the fact that Mr. Hernandez was not a registered or authorized agent for service of process on behalf of Locabail. (R-15). Rather, Tavoulareas simply stated that "Locabail has subjected itself to the jurisdiction of this Court by its conduct

and involvements" in that Locabail's counsel and Tavoulareas' counsel entered into settlement discussions and Tavoulareas paid Locabail's counsel to prepare settlement documents and that BNP appointed a BNP officer as president of Locabail. (R-15-5,6).

Also in his Opposition, Tavoulareas addressed the merits of whether the District Court presented an inconvenient venue. (R-15-5,6). In this regard, Tavoulareas simply asserted, without any supporting affidavits, that he did not have sufficient contacts with London, that the London Court had no jurisdiction over him, and that he would be severely inconvenienced if he were compelled to assert his claims anywhere other than Florida. (R-15-5,6). Tavoulareas further contended that Locabail would not be inconvenienced by litigation in Florida because its parent company, BNP, was registered to do business in Florida and that the case presented primarily issues of law for the court's resolution. (R-15-6).

3. Tavoulareas' Motion for Leave to Amend to Add a Fraud Count Relating to Alleged Acts That Occurred Over Twenty Years Ago

On September 12, 2000, Tavoulareas filed a Motion for Leave to File an Amended Complaint seeking to add a count alleging fraud with respect to alleged acts that occurred over twenty years ago (the "Motion for Leave to Amend"). (R-26). Tavoulareas served this motion one day after the District Court had, *sua sponte*, set the matter for hearing on September 25, 2000 on Defendants' Motions to Dismiss. (R-25) (R-26). Count II of Tavoulareas' Amended Complaint alleged that, unbeknownst to him, his former

partner in the Atlas Shipping Company, Ares Emmanuel, allowed Atlas guarantees to be placed on four vessels in favor of Locabail and two other banks. (R-39-6). Tavoulareas further alleged that Locabail committed various frauds upon him, as Atlas, which he discovered only during the litigation between Locabail and his ex-wife. (R-39-6). Tavoulareas further claimed that Paribas, the predecessor of BNP, was intimately involved in this conduct. (R-39-7).

Defendants responded that the District Court should deny Tavoulareas' Motion for Leave to Amend because any amendment of Tavoulareas' Complaint would be futile and would not cure the deficiencies that the Defendants previously addressed in their Motions to Dismiss or Alternatively for Summary Judgment. (R-41) (R-42). The District Court granted the Defendants' motions for extension of time to respond to the Amended Complaint until after disposition of the then pending motions. (R-44).

4. Tavoulareas' Efforts to Belatedly Supplement its Opposition to Locabail and BNP's Motions to Dismiss

On September 13, 2000, Tavoulareas filed a Motion for Leave to File Additional Documents in Opposition to Defendants' Motions to Dismiss, namely opposing affidavits. (R-27). Over Locabail and BNP's objection, given the imminence of a scheduled hearing on the Motions to Dismiss, the District Court granted Tavoulareas' motion and instructed him to file any supplemental documents within five (5) days, *i.e.*, on or before November 23, 2000. (R-48).

On October 20, 2000, Locabail filed a Motion to Strike as Untimely Filed Plaintiff's Replies to Defendant's Responses to (1) Plaintiff's Verified Motion or Leave to File Verified Amended Complaint, and (2) Plaintiff's Motion for Leave to File Additional Documents in Opposition to Motions to Dismiss and Incorporated Memorandum of Law (the "Motion to Strike), which Tavoulareas served over two weeks and one week late, respectively. (R-40). The District Court granted Locabail's Motion to Strike Tavoulareas' untimely replies. (R-46).

On November 21, 2000, two days before his supplemental documents were due to be filed, Tavoulareas filed a motion for extension of time through November 29, 2001 to file additional documents in opposition to Defendants' Motions to Dismiss, which the District Court granted. (R-50) (R-51). On November 29, 2000, instead of filing supplemental affidavits as requested, Tavoulareas filed a Supplemental Response to Defendants' Motions to Dismiss or Alternatively for Summary Judgment (the "Supplemental Response"). (R-52). Locabail and BNP both filed Motions to Strike Tavoulareas' Supplemental Response on the grounds that (1) it exceeded the scope of Tavoulareas' Motion for Leave to File Additional Documents, *i.e.*, affidavits, and (2) it constituted in fact a second, and new, opposition memorandum of law in response to Defendants' properly filed Motions to Dismiss. (R-53) (R-54). In addition, Locabail and BNP's Motions to Strike pointed out that the multiple exhibits and other documents attached to Tavoulareas' Supplemental Response did not meet the requirements of Fed.R.Civ.P. 56(e) because they were either unsworn,

uncertified, unauthenticated and/or constituted inadmissible hearsay. (R-53) (R-54).

5. The January 4, 2001 Hearing on Pending Motions

After two continuances occasioned by Tavoulareas' motion for a continuance and the failure of Tavoulareas' counsel to appear for a scheduled hearing due to an unexpected emergency, the District Court conducted a hearing on January 4, 2001 on Tavoulareas' Motion for Leave to Amend and the Defendants' Motions (the "Hearing"). (R-68). At the Hearing, where Mr. Tavoulareas was also present, the District Court addressed, *inter alia*, various issues with respect to whether that court was an inconvenient forum for the litigation among the parties. (R-68-20, 35-37).

At the Hearing, Tavoulareas' counsel admitted that the alleged fraud and/or conspiracy occurred in Europe, and that although Tavoulareas had a residence in Florida at the time, he was "throughout Europe" during the pertinent time. (R-68-20). Tavoulareas further admitted that the alleged fraudulent deals took place in Greece, Libya, and various different places throughout Europe. (R-68-20). In addition, Tavoulareas conceded that U.S. law would probably not apply to his Count II for alleged fraud because it allegedly occurred in so many different places throughout Europe. (R-68-20,35-36). Tavoulareas' counsel also admitted at the hearing upon questioning from District Judge Ryskamp that except for Mr. Tavoulareas, the witnesses to the alleged fraudulent

transactions were located throughout Europe and several were located in London:

> The witnesses are all over the place. . . . There is no great venue for this lawsuit. Mr. Tavoulareas is here. Mr. Emmanuel is in Greece. Mr. Walker, who is one of the main perpetrators of the fraud, I believe is in Paris.
>
> *There are various individuals who are in London.* The parent bank Paribas now BNP has offices in Paris. The moneys came out of Bermuda. There's a lot of different places where those individuals would be.

(R-68-36,37) (emphasis added). Significantly, Tavoulareas engaged in this venue analysis with the District Court at the Hearing without asserting any objection whatsoever with respect to any alleged concerns regarding lack of notice, opportunity to be heard or opportunity to present evidence pertinent to the issue. (R-68). Nor could Tavoulareas legitimately have done so given that Locabail had raised the issue of inconvenient venue more than six months earlier in its Motion to Dismiss filed June 22, 2000, to which Tavoulareas responded on the merits in its opposition. (R-10-11,12) (R-15-5,6). Nor did Tavoulareas request any opportunity to further brief the issue of inconvenient venue or to present any supplemental evidence relating to the issue. (R-68).

More than a week *after* the hearing, Tavoulareas unilaterally submitted a Notice of Filing Affidavits of Barbara Emmanuel and Peter Tavoulareas without leave of court, belatedly seeking to introduce additional facts in connection with the disposition of Defendants' Motions to Dismiss. (R-62). It is not clear from the record whether

the District Court considered Tavoulareas' unauthorized and late affidavits in connection with ruling on the Defendants' Motions to Dismiss.

6. The Dismissal Order

The District Court rendered its Order Granting Defendants' Motions to Dismiss Complaint (the "Dismissal Order"), which granted Locabail and BNP's Motions to Dismiss Complaint and denied Tavoulareas' Motion for Leave to File Amended Complaint as moot. (R-64).

The District Court expressly dismissed Tavoulareas' declaratory judgment action for lack of an actual case or controversy (R-64-6,7). The District Court determined that Tavoulareas' Complaint presented a hypothetical and premature controversy that impermissibly sought an advisory opinion from the court with respect to the enforceability of the English Cost Liability Judgment, prior to the entry of any actual cost judgment and any action by Locabail to enforce it in the United States. (R-64-6,7).

The District Court also further declined to exercise its discretion to hear Tavoulareas' declaratory judgment action after applying the requisite second and fourth factors implicated by this case, *i.e.*, (2) whether the declaratory complaint was filed in anticipation of another suit and was being used for the purpose of forum shopping, and (4) ***whether there was inconvenience to the parties or the witnesses***. (R-64-6) (emphasis added). In this regard, the District Court stated:

> While the first and third factors are not implicated in this present case, Plaintiff has filed in anticipation of a state court action by Defendant Locabail to enforce the cost judgment. Plaintiff seeks a declaration that the cost judgment 'is repugnant to Florida law and violates Florida's public policy [,]' (Am. Complaint ¶ 14), a claim that clearly would otherwise be raised as a defense in a state court proceeding to enforce the cost judgment. ***With respect to Defendant Locabail, the fourth factor cited by the Great Lakes court is also applicable. Locabail asserts that it is 'at a tremendous disadvantage, and faces considerable inconvenience, burden and expense to defend the declaratory judgment filed by the Plaintiff since it operates its business in London, England.'*** (Def. Locabail's Mot. to Dismiss at 11).

(R-64-6,7) (emphasis added).

In addition, the Dismissal Order stated that even assuming *arguendo* that this Court has personal and subject matter jurisdiction and that venue was proper, Plaintiff's complaint should still be dismissed based on the doctrine of *forum non conveniens*. (R-64-7). The District Court reasoned that:

> In the present case, the Plaintiff has acknowledged that the alleged fraud took place in one or several European countries or the United Kingdom. Therefore, an alternative forum is presented by the courts of these nations. Furthermore, it appears that most witnesses are in Europe or the United Kingdom, including those essential witnesses associated with Locabail. Indeed, as noted above, Locabail has asserted that it is extremely disadvantaged since

> it operates its business in London. Additional concerns include problems of enforcing a judgment if one is obtained and ease of access to the records maintained by BNP and Locabail. The private and public factors outlined by the *Gulf Oil* Court clearly weigh in favor of dismissing the fraud count. Therefore, this Court must conclude that this action for fraud should be dismissed on forum non conveniens grounds.

(R-64-9).

Tavoulareas appealed the District Court's dismissal of his action for fraud. In affirming the Dismissal Order per curiam, the Eleventh Circuit reasoned:

> We review a dismissal based on *forum non conveniens* for abuse of discretion, affording the district court "substantial deference." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1310 (11th Cir. 2001) (internal citation omitted). After carefully reviewing the briefs and the record, we find that the district court did not abuse its discretion in dismissing Appellant's action. Appellant has admitted that the fraud took place in England and several European countries. The bulk of the relevant witnesses appear to be located in the United Kingdom. The Appellees conduct the bulk of their operations overseas, and litigating the case here would cause them substantial hardship. Indeed, the only connection between the Appellant's allegations of fraud and the Southern District of Florida appears to be that the Appellant resides there and would like to litigate his claim there. In such a circumstance, it is not an abuse of discretion for the district court

to dismiss a case on the ground of *forum non conveniens*.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari. The Eleventh Circuit's decision does not so far depart from established and usual course of proceedings related to a *forum non conveniens* determination to warrant the extraordinary exercise of this Court's supervisory power under Sup. Ct. R. 10(a). Indeed, Sup. Ct. R. 10 further provides that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, grounds which the Petitioner essentially asserts in his Petition. Rather, the Court of Appeals applied this Court's clear and undisputed principles governing discretionary *forum non conveniens* determinations, cited by both parties as controlling, to the particular facts presented in this case. Petitioner simply disagrees with the outcome.

It has long been established that this Court's discretionary review is limited to those matters involving questions of public importance. *Southern Power Co. v. North Carolina Public Serv. Co.*, 263 U.S. 508 (1924); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923) ("the Court should be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and

authority between the Circuit Courts of Appeals."). Where the case involves matters of fact that are "of no general importance," the Court follows the "rule of non-interference where the conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927). As this Court expressed its policy in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955): "[T]his Court does not sit to satisfy a scholarly interest. . . . Nor does it sit for the benefit of particular litigants. 'Special and important reasons' " imply a reach to a problem beyond the academic or the episodic [citations omitted]. *See also National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

The outcome of the instant matter is of interest to the litigants, but is of no general public importance, because a decision herein cannot serve to do more than solve this particular controversy. Because the principles are undisputed, and they must be applied to fact situations that will vary from case to case, review herein cannot resolve other conflicts nor can it serve to further elucidate the law. Given the long-standing policy concerning this Court's discretionary review, Petitioner's dissatisfaction with the Opinion and Order below falls far short of showing any compelling reason for this Court's extraordinary review. The Petition should be denied.

I. TAVOULAREAS HAD NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF *FORUM NON CONVENIENS* BEFORE THE DISTRICT COURT

Tavoulareas' contention that he was wrongfully deprived of sufficient notice and opportunity to be heard before the District Court dismissed his Complaint without prejudice on *forum non conveniens* grounds is without merit. The record in this case squarely contradicts Tavoulareas' suggestion that he was unfairly blindsided by the District Court's *forum non conveniens* inquiry at the hearing and that he did not have notice and an opportunity to be heard on the issue. Conspicuously absent from Tavoulareas' Petition for Writ of Certiorari is any recognition that the parties had in fact briefed and addressed below the issue of inconvenient venue, *i.e.*, inconvenience to the parties and witnesses, albeit in connection with the Defendants' Motions to Dismiss the Declaratory Judgment Action. In addition, Tavoulareas did not object to the District Court's consideration of the *forum non conveniens* issue, either at the hearing or after entry of the Dismissal Order. Rather, Tavoulareas actively engaged in this discussion and made unqualified representations to the District Court concerning the location of witnesses, evidence, etc. Tavoulareas never once requested the opportunity or voiced the necessity to present evidence on the issue. Therefore, Tavoulareas' complaints for the first time on appeal of his perceptions of procedural impropriety in the District Court were both untimely and without merit on this record.

More than six months prior to the hearing, Locabail in its Motion to Dismiss asserted that the Southern District of Florida was an inconvenient forum for any litigation with Tavoulareas and that London, England was the more appropriate forum. (R-10-11,12). As supported by the facts set forth in the Fitzpatrick Affidavit, Locabail asserted that it would be at a tremendous disadvantage and faced considerable inconvenience, burden and expense to defend the declaratory judgment action filed by the Plaintiff in Florida because it operates its business in London, England. (R-10-11,12) (R-10-23,24). Locabail also pointed out that the English Cost Liability Judgment, attached to the Complaint as Exhibit "B," stated that Tavoulareas used to reside in England, with his wife and children, maintained property in England and conducted business in England. (R-10-11,12) Locabail further asserted that it was well-established that it had no contacts with Florida. (R-10-11).

In his Opposition, Tavoulareas addressed the merits of whether the District Court presented an inconvenient forum. (R-15-5,6). In this regard, Tavoulareas simply asserted, without any supporting affidavits, that he did not have sufficient contacts with London, that the London Court had no jurisdiction over him, and that he would be severely inconvenienced if he were compelled to assert his claims anywhere other than Florida. (R-15-5,6). Tavoulareas further contended that Locabail would not be inconvenienced by litigation in Florida because its parent company, BNP, was registered to do business in Florida and that the case presented primarily issues of law for the court's resolution. (R-15-5,6).

Indeed, the hearing transcript plainly reflects that Tavoulareas did not object at the hearing, where Mr. Tavoulareas was present, with respect to the District Court's discussion regarding *forum non conveniens* analysis, or otherwise request the opportunity to further brief the issue beyond its Response or to submit supporting affidavits on the issue. (R-68). Rather, Tavoulareas actively engaged in this discussion and made unequivocal representations to the District Court concerning the location of witnesses, evidence, etc. Tavoulareas never once requested the opportunity or voiced the necessity to present evidence on the issue. (R-68-20, 35-37).

At the hearing, the District Court addressed, *inter alia*, various issues with respect to whether that Court was an inconvenient forum for the litigation among the parties. (R-68-20, 35-37). Tavoulareas' counsel admitted that the alleged fraud and/or conspiracy occurred in Europe, and that although Tavoulareas had a residence in Florida at the time, he was "throughout Europe" during the pertinent time. (R-68-20). Tavoulareas further admitted that the alleged fraudulent acts took place throughout Greece, Libya, and various different places throughout Europe. (R-68-20). In addition, Tavoulareas conceded that U.S. law would probably not apply to his Count II for alleged fraud because it occurred in so many different places throughout Europe. (R-68-20,35-36). Tavoulareas' counsel also admitted at the Hearing upon questioning from District Judge Ryskamp that except for Mr. Tavoulareas, the witnesses to the alleged fraudulent

transactions were located throughout Europe and several were located in London. (R-68-36,37).[1]

Second, Tavoulareas improperly raised for the first time on appeal before the Eleventh Circuit an alleged issue regarding lack of notice and opportunity to be heard and to present evidence, *i.e.*, whether the court improperly dismissed Tavoulareas' Amended Complaint on *forum non conveniens* grounds without prior notice that the issue would be addressed at the hearing and the opportunity to present evidence.[2] Tavoulareas' failure to raise any of these issues or to otherwise assert any objection related thereto at the hearing or after entry of the Dismissal Order constitutes a waiver. *United States Equal Empl. Opp'ty Comm'n v. W&O, Inc.*, 213 F.3d 600, 620 (11th Cir. 2000), *citing Denis v. Liberty Mut. Ins. Co.*, 791 F.2d 846, 848-849 (11th Cir. 1986); *see also Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 820, n. 12 (11th Cir. 1984) ("Because the defendant's objection does not question this court's subject matter jurisdiction, we find that the defendant's failure to raise the objection at the trial level resulted in its waiver"); *Brent v. Ashley*, 247 F.3d 1294, 1305 (11th Cir. 2001) (appellate courts generally will not

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[1] In his Petition, Tavoulareas now contradicts this representation by stating that there is only one potential witness with respect to the alleged fraud that resides in the United Kingdom.

[2] In the Southern District of Florida, parties are not entitled to a hearing as of right and motions are routinely disposed of on the papers presented. *See* S.D.Fla.L.R. 7.1(B). Rather, hearings are set by the Court within its discretion. The District Court in this case afforded the parties the additional opportunity of a hearing.

consider an issue or theory that was not raised in the district court); *Ferrell v. The Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999) ("as a general principle, this court will not address an argument that has not been raised in the district court").

In sum, Tavoulareas has not presented this Court with any compelling reason to require this Court's discretionary exercise of its supervisory power. Indeed, Tavoulareas in his Petition repeatedly acknowledges the well-established proposition that in *forum non conveniens* determinations "each case turns on its facts," yet nevertheless proceeds to ignore the record and the facts in this case. On this record, Tavoulareas cannot reasonably maintain that the District Court abused its discretion in dismissing his Complaint for *forum non conveniens* or failed to provide him with appropriate notice and an opportunity to be heard to address the merits of this issue, or that the appellate court erred in affirming that dismissal. Accordingly, this Court should deny the Petition.

II. THE DISTRICT COURT DID NOT SO FAR DEPART FROM THE ESTABLISHED AND USUAL COURSE OF PROCEEDINGS IN DETERMINING THE EXISTENCE OF AN ADEQUATE ALTERNATE FORUM OR IN WEIGHING THE REQUISITE PUBLIC AND PRIVATE INTEREST FACTORS[3]

Tavoulareas' contention that the District Court so far departed from the established and usual course of

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[3] Locabail responds to Petitioner's Points I and II in this section.

proceedings to warrant this Court's review in failing to give deference to Tavoulareas' choice of forum, in failing to articulate an adequate alternative forum, and in failing to properly balance private and public interest factors is without merit. Although Tavoulareas clearly disagrees with the District Court's decision to exercise its discretion to dismiss his action on *forum non conveniens* grounds, the record in this case does not support a finding of abuse of discretion by the District Court.

Even assuming that the District Court made erroneous factual findings or misapplied the principles for *forum non conveniens* determinations set forth in *Gulf Oil*, which it did not as examined below, such assertions of error rarely justify this Court's certiorari review. Sup. Ct. R. 10. Notwithstanding the foregoing, the District Court recognized the correct legal standard to apply to the *forum non conveniens* analysis and articulated those standards in its Dismissal Order:

> To dismiss on the basis of *forum non conveniens*, a court must find that an adequate alternative forum is available, and that relevant private and public interest factors weigh in favor of dismissal. *See Trujillo v. Banco Central del Ecuador*, 35 F.Supp. 2d 908, 911 (S.D. Fla. 1998) (citing *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996)). Private interest factors include
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> > the relative case of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy expeditious

> and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Gulf Oil, 330 U.S. at 508. Public interest factors include "[a]dministrative difficulties" which result "when litigation is piled up in congested centers instead of being handled at its origin[;]" the burden of jury duty that is imposed on a community unrelated to the litigation; the difficulties of the district court in "untangl[ing] problems . . . in law foreign to itself[;]" and the "local interest in having localized controversies decided at home[.]" *Id.* at 508-509. However, the Supreme Court has also instructed that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508, 67 S. Ct. at 843. In short, "[d]ismissal on forum non conveniens grounds is within the district court's range of discretion when trial in plaintiff's chosen forum would impose a heavy burden on the defendant or the court and an adequate alternative forum is available." *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996).

(R-64).

Applying those principles to the facts presented in this case, the District Court did not abuse its discretion in dismissing Tavoulareas' action on *forum non conveniens* grounds. In the Dismissal Order, the District Court reasoned that:

> In the present case, the Plaintiff has acknowledged that the alleged fraud took place in one or several European countries or the United Kingdom. Therefore, an alternative forum is

> presented by the courts of these nations. Furthermore, it appears that most witnesses are in Europe or the United Kingdom, including those essential witnesses associated with Locabail. Indeed, as noted above, Locabail has asserted that it is extremely disadvantaged since it operates its business in London. Additional concerns include problems of enforcing a judgment if one is obtained and ease of access to the records maintained by BNP and Locabail. The private and public factors outlined by the *Gulf Oil* Court clearly weigh in favor of dismissing the fraud count. Therefore, this Court must conclude that this action for fraud should be dismissed on forum non conveniens grounds.

(R-64-9).

The District Court properly concluded that alternative forums exist in one or several European countries or the United Kingdom – especially where Tavoulareas did not argue that any of these alternatives were inadequate, but rather that the Southern District of Florida was his preferred venue. Indeed, as the English Cost Liability Judgment attached to Plaintiff's Complaint reflected, Tavoulareas formerly resided in England with his wife and children, maintained property in England and conducted business in England. In addition, Locabail's contacts with England were uncontroverted. The District Court also properly concluded that the balance of private and public interest factors strongly weighed in favor of Defendants such that litigation in Tavoulareas' choice of forum in Florida would impose a heavy burden on the Defendants and should be disturbed. As Tavoulareas admitted at the hearing, most of the witnesses are in Europe or the United Kingdom and the alleged fraud took place in one

or several European countries or the United Kingdom. The extreme disadvantage to the Defendants/Respondents to force them to litigate here rather than where the witnesses, evidence and alleged controversy arose, is evident from the record.[4] Under these circumstances, where the only apparent connection between the Southern District of Florida and Tavoulareas' Complaint against Locabail and BNP is Tavoulareas' residence in Florida and his desire to litigate there instead of abroad, where the alleged controversy arose, Tavoulareas cannot maintain that the District Court's Dismissal Order constituted an abuse of discretion or so far departed from the established and usual course of proceedings to justify this Court's extraordinary exercise of certiorari review.

III. THE DISMISSAL ORDER AS TO LOCABAIL WAS ALSO PROPER ON THE GROUNDS OF LACK OF PERSONAL JURISDICTION, INSUFFICIENCY OF PROCESS AND INSUFFICIENCY OF SERVICE OF PROCESS

In addition to the propriety of the Dismissal Order on the grounds of *forum non conveniens*, the dismissal of the instant action was also appropriate for lack of personal jurisdiction over Locabail, insufficiency of process and insufficiency of service of process on Locabail.

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[4] It is not an abuse of discretion if the district court does not issue a sufficiently detailed order, as long as an appellate court can discern the district court's reasoning from its order on the record, that is all that is required in that respect. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996).

The District Court had no personal jurisdiction over Locabail because Locabail is a foreign entity, registered and doing business in England, not registered or otherwise conducting business in the State of Florida, and does not have sufficient minimum contacts with the state of Florida to satisfy traditional notions of fair play and substantial justice. In addition, pursuant to Fed.R.Civ.P. 12(b)(4) and (5), Locabail was not served with process in accordance with Fed.R.Civ.P. 4 because the person served, Ramon Hernandez, was neither Locabail's registered for service of process nor otherwise authorized to receive process on behalf of Locabail.

Although the District Court did not specifically address these issues in its Dismissal Order, Locabail raised these issues, and both parties fully briefed and argued them before the District Court. (R-10) (R-15). It is a basic proposition that an appellate court may affirm a District Court's decision for reasons different than those stated by the District Court where the judgment is correct on any legal ground supported by the record. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 (11th Cir. 1998), *citing Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (stating that the decision of the lower court must be affirmed if the result is correct even though the lower court relied upon a wrong ground or gave a wrong reason); *C.H. Robinson Co. v. Trust Co. Bank, N.A.*, 952 F.2d 1311, 1316 (11th Cir. 1992); *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) (holding that "this court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court."); *U.S. v. Blue Cross and Blue*

Shield of Alabama, 156 F.3d 1098, 1110-1111 (11th Cir. 1998); *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 (11th Cir. 1998); *Hoffman v. Comshare, Inc.*, 183 F.3d 542, 547-548 (6th Cir. 1999) ("a federal court of appeals is not restricted to ruling on the district court's reasoning, and may affirm a district court's grant of a motion to dismiss on a basis not mentioned in the district court's opinion"); *Powers v. U.S.*, 996 F.3d 1121, 1123 (11th Cir. 1993) ("we may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below"), *citing Young v. Commissioners*, 936 F.2d 1083, 1090 (11th Cir. 1991). Stated differently, an appellate court "may not reverse a judgment of the district court if it can be affirmed on any ground, regardless of whether those grounds were used by the district court." *See Magluta v. Samples*, 162 F.3d 662, 664 (11th Cir. 1998); *Rowe v. Schreiber*, 139 F.3d 1381, 1382, n.2 (11th Cir. 1998).

The parties fully briefed the jurisdictional issues before the District Court. (R-10) (R-15) (R-18) (R-22) (R-24) (R-47) (R-56). In short, Locabail argued that significantly, and fatally, Tavoulareas' Opposition to Locabail's Motion to Dismiss completely failed to submit any affidavits to refute Locabail's evidentiary showing with respect to a lack of personal jurisdiction. (R-10) (R-15) (R-22). Thus Tavoulareas failed to carry his burden of proof under Florida's long-arm statute or to otherwise shift the burden of persuasion to Locabail. *See Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889, 890-91 (11th Cir. 1983); *Rubaii v. Lakewood Pipe of Texas, Inc.*, 695 F.2d 541 (11th Cir. 1983); *Prentice v. Prentice Colour, Inc.*, 779 F.Supp. 578, 581 587 (M.D. Fla. 1991);

Groome v. Feyh, 651 F.Supp. 249, 250-51 (S.D. Fla. 1986); Fla. Stat. § 48.193; *Murphy v. Republic Health Corp.*, 645 F.Supp. 124, 125 (S.D. Fla. 1986); *Polskie Linie Oceaniczne v. Seasafe Transport*, 795 F.2d 968, 972 (11th Cir. 1986), *citing Bloom v. A.H. Pond Co., Inc.*, 519 F.Supp. 1162, 1168 (S.D. Fla. 1981). Therefore, under *Murphy, Bloom, Prentice* and *Polskie*, the Dismissal Order was also correctly entered on the grounds of lack of personal jurisdiction over Locabail. *See also Piper v. United States*, 392 F.2d 462, 464 (5th Cir. 1968) (denials in an unverified pleading are insufficient to controvert an affidavit offered in support of a motion); 6 Moore's Federal Practice P 56.22[1] at 56-1304 n.5 (2d ed. 1976) ("Unsworn statements cannot be considered.").

Finally, Tavoulareas did not properly serve Locabail pursuant to Fed.R.Civ.P. 4(h) because Ramon Hernandez was not an officer, a managing, resident, general or otherwise appointed agent for Locabail. In addition, the process was facially deficient because it incorrectly identified Locabail as having a Registered Agent, Ramon Hernandez, located in Miami, Florida, and failed to state the address of the principal business offices of Locabail in London, England. Accordingly, Tavoulareas' failure to obtain proper service over Locabail in accordance with Fed.R.Civ.P. 4 and the patent insufficiency of the process presented additional bases for the appellate court's affirmance of the Dismissal Order.

CONCLUSION

For the foregoing reasons, Respondent Locabail (UK) Limited respectfully submits that Tavoulareas' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALLAN R. KELLEY
Counsel of Record
JUNE GALKOSKI HOFFMAN
FOWLER WHITE BURNETT, P.A.
Bank of America Tower, 17th Floor
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201
Counsel for Respondent
Locabail (UK) Limited